Supreme Court of the United States

OCTOBER TERM, 1901.

No. 51.

MILTON C. MITCHELL, PLAINTIFF IN ERROR,

vs.

THE POTOMAC INSURANCE COMPANY OF GEORGETOWN, D. C.

ARGUMENT AND BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Statement of Facts.

This is a writ of error to the Court of Appeals of the District of Columbia seeking to reverse a judgment of that court entered in a suit instituted by Mitchell, the plaintiff in error, on a policy of insurance for the loss sustained by reason of an accidental fire. The insurance policy was for $5,000 on his stock in trade, which was completely destroyed on the 28th of September, 1896, and the claim of the declaration was for that amount, with interest from the 19th day of November, 1896. The property insured is described in the written part of the contract as follows:

"On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a

first-class retail stove and tin store, situate 3108 M street, Georgetown, D. C. Privilege granted to keep not more than five barrels of gasoline or other oil or vapor" (R., p. 5).

The indemnity was "against all such immediate loss or damage as may occur by fire to the property specified," and in very fine print there was a provision in the policy to the effect that the insuring company would not be liable "for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only." The policy also specified certain articles which might not be "kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time without written consent," and if so kept, the policy should be void. Gasoline was not included in these inhibited articles (R., pp. 5, 6).

For this policy the last annual premium paid by the appellant was $72.50, distributed as follows: $25 on the gasoline and $47.50 on the rest of the stock (R., p. 9). It was in force on the 28th day of September, 1896, when a fire occurred, resulting in the demolition of the building and the practical destruction of the entire stock, excepting only the gasoline.

House 3108 M street, in which the insured commodities were stored, was a three-story brick building, erected in the early days of Georgetown. It was 17 feet front by a depth of 40 feet. All the stories were much cut up by openings for store door, show and other windows. The first floor was used as a store-room. Down the middle of this from front to rear was a platform in three tiers, containing stoves, ovens, and other weighty articles. Stoves were also placed along the east and west sides of the store-room. In the second and third stories surplus stock was kept, also composed of heavy stoves, heaters, ovens, etc. The store floor was supported by joists running east and west, which were very old, and a "condition of dry rot existed in most of them."

There was a back building about 9 feet wide and two stories high. The ground floor was divided into small rooms, one of which was used also as a store-room, though but few things were there exhibited. In this also was the pumping machinery for the gasoline tank in the cellar below. The other rooms of the back building were used as work-shops.

Under the main store-room there was a cellar 17 by 40 feet. It was reached by steps in the rear of the main building and was without windows. It was lighted only from the opening for the steps, and had no gas jets or artificial lighting of any kind. There was also an opening at the front, but over this were light pine doors, which were opened only when heavy goods were being put down from the street. These doors were used as a sort of show-case for tin cans, coffee pots, and other light ware. In this cellar were stored the heavier stoves and furnaces, and here goods were unpacked—a process which littered the floor with bits of tarred string, excelsior, and other inflammable substances.

Fire-brick and stove castings were kept on shelves, separated by upright posts and running along the east wall of the main cellar, the lowest shelf being about 18 inches from the cellar floor. These shelves were entirely open, and the different tiers or sections were called bins (R., p. 10).

This cellar, being lighted only by the opening for the back steps, was generally very dark, so it was necessary to use a match or a candle to find anything that might be wanted. Lighted matches were often dropped on the floor with no resulting injury, and frequently there were as many as half a dozen lighted candles sitting about on the cellar floor at different places, when there was much work to do (R., p. 7). In this front cellar also was a furnace which had been in use for many years, with the ash-box about three inches above the floor.

There was also a small back cellar, about 9 x 12 feet, which could be entered only by an opening from the front

cellar, intended as a doorway, but there was no door. The back cellar floor was 15 or 16 inches higher than the floor of the front cellar. The opening between the two cellars had a doorsill about 4 inches high, set in stone and mortar; otherwise the two cellars were separated by a brick wall. In the west wall of this back cellar was a small window, containing six panes of glass of the ordinary size. In this cellar also on dark days matches and lighted candles were used, and lighted matches were frequently left by the workmen on stoves and shelves or dropped on the floor. Scattered about were tarred strings and other inflammable substances, in which stoves and the lighter articles of stock had been packed.

Sunk into the floor of this cellar was the gasoline tank, made of cast iron, and having an iron cover. The top of it was 18 inches beneath the floor, and on this was put earth with concreting at the surface. The tank was supplied by a pipe opening only into the back store-room, and gasoline was drawn out of the tank for customers by automatic pumping machinery, also in the back store-room. This tank held a little more than five barrels. On Saturday, the 26th of September, two days before the fire, the supply of gasoline ran low and five barrels were ordered; but one came, and its contents were at once siphoned into the tank through the supply pipe. Much of this was sold later in the day, so the tank was practically empty all of Sunday and until about noon on Monday, when the other four barrels of gasoline, which had been ordered the Saturday before, were put into the tank.

On Monday, the 28th day of September, 1896, about one o'clock in the afternoon, Oliver, Mitchell's book-keeper and general manager, was alone in the store when a customer came who wanted a piece of casting such as was kept only in the cellar. Oliver went to get it. When he reached the cellar he noticed no smell of gasoline vapor, with which he was quite familiar. It is pungent, unmistakable, and easily

detected. The particular bit of casting wanted was on the shelf on the east side of the front cellar, about 15 feet from the entrance to the back cellar, and so far from the door that he could not see. He struck a match and commenced looking along the shelves, but before he found what he wanted, the match became short and burnt his fingers. Thereupon he dropped the first match, struck a second, and continued his search. Suddenly the cellar became enveloped in a blue flame, which Oliver recognized as burning gasoline vapor. He noticed the flame first "all over the cellar" (R., p. 8). There was no noise or sound as of an explosion; only a sh-sh-sh like the swish of a whip. He then became unconscious. On recovering consciousness, the first thing he noticed was that the back cellar was full of fire, and knowing the gasoline tank was there, he tried to get the other way. The building had collapsed, and the store floor joists had broken in the middle, one end of them resting on the cellar floor, the other against the east wall, near which Oliver found himself. Under these broken joists, through the debris, he worked his way to the front foundation wall. Through this a hole was dug by persons on the street, and Oliver was rescued, much scarred and singed. In the fall of the building the customer was killed.

The building had collapsed, and the stock of the plaintiff in error was injured to the extent of $4,568.80 (R., p. 9). This was the first and only time when anything like burning gasoline vapor had ever been noticed in Mitchell's cellar, though in busy seasons it was not unusual for matches to be lighted in the cellar every fifteen minutes of the day, and September was one of the busiest months.

The nature and characteristics of gasoline and gasoline vapor were shown by two experts called by appellant—Professor Munroe, of the Columbian University, and Mr. Howe, in charge of the naphtha department of the Standard Oil Company. According to them, gasoline will not burn and

is no more explosive than wood. A lighted match put into liquid gasoline will be extinguished.

The safest way of keeping it is in tanks, and it then is less liable to give off vapor. It generates vapor at all times, which has a distinctly recognized odor that cannot be mistaken. The vapor is three times as heavy as air and runs down hill like water, until it assumes a position of equilibrium, where, if not disturbed, it gives off a very slight odor. It can be ignited by a flame or an electric spark, and burns rapidly with a pale blue flame. It never ascends except by slow diffusion. To make an explosion sufficient to create a great amount of damage the vapor would have to be distributed generally throughout the cellar. Its presence under these circumstances would be detected by the odor. Undisturbed, layers of vapor might accumulate on the cellar floor in quantities sufficient, if ignited, to produce a partial vacuum by quick combustion. This, according to Mr. Howe, is the chief danger from the presence of vapor in the cellar.

In certain combinations with air—between 5 and 25 per cent.—it becomes an explosive. Over 25 per cent. and under 5 per cent. it is combustible only. And the explosion is most violent where there is 10 per cent. of vapor and 90 per cent. of atmospheric air.

According to Professor Munroe, one volume of gasoline will give off 140 volumes of vapor. To give a 3 per cent. mixture, a mild explosive, in the front cellar, would take 7.4 gallons of gasoline; a 10 per cent. mixture, 24.7 gallons; a 25 per cent. mixture, 61 gallons. To give a highly explosive mixture in the front cellar would take 24.7 gallons; that is 10 per cent.

To give a 3 per cent. mixture in the back cellar would take 1.91 gallons; a 10 per cent. mixture, 6.4 gallons; a 25 per cent. mixture, 15.94 gallons.

The tank contained 64,680 cubic inches and held just vapor enough to make a 3 per cent. mixture in the back cellar.

Professor Munroe also made some calculations with regard to air pressure, which showed that this pressure, which is 15 pounds per square inch upon an area equal to the surface of Mitchell's store floor, would be 641 tons. The pressure upwards being the same, equilibrium results. At the rate of one pound per square inch the pressure on an area the size of this store would be nearly 43 tons. The result of a rapid combustion of gasoline vapor in the cellar would be an expansion of the air in the cellar. On the completion of the combustion a vacuum would be formed by the cooling of this expanded air and the product of the combustion.

After hearing the testimony of the witness Oliver, Professor Munroe gave it as his opinion that the collapse of the building was due to the rapid combustion of some substance in the cellar, causing a partial vacuum, and an increased pressure downwards on the surface of the floor, causing it to give way.

Professor Munroe also defined an explosion as being "the result due to the conversion of a solid or a liquid into a gas or the expansion of a gas, which is accompanied with a loud report and the shattering of material about it."

Plaintiff in error also produced as witnesses five persons, all quite near his building at the time it collapsed. None of them heard any sound like an explosion. Several of them described the noise they noticed by the sound "feu-feu," which they compared to the noise made by the burning of a bad firecracker.

The insurance company relied, by way of defense, upon the provision of the policy which exempted the underwriter from liability for damage caused by explosions of any kind, though it was not shown that this provision, which was in very fine print, had been called to the attention of Mitchell. Four witnesses were also called, all of whom were more than a block away from Mitchell's building at the time of the occurrence. They described the noise as an explosion, which

one of them illustrates as being like "the noise of the sun-down gun over at Fort Myer" as heard in Georgetown.

On these facts and certain rulings of the trial court, to which exceptions were taken, a verdict was rendered in favor of defendant company. A motion for a new trial was interposed and overruled, and thereupon judgment was entered on the verdict. From this judgment the plaintiff below appealed to the Court of Appeals, where the judgment was affirmed (16 D. C. App., 241).

ASSIGNMENT OF ERRORS.

The Court of Appeals erred—

1. In sustaining the trial court in its refusal to grant the first prayer asked by counsel for the plaintiff; which prayer is as follows (R., pp. 22, 23):

"If the jury find from the evidence that on the 28th day of September, 1896, at or before the time the witness Oliver went into the cellar of the plaintiff's premises, as described by him, a fire originating in accidental or other causes was in progress in the back cellar of said premises, and that afterward and while such fire was in progress the gas or vapor generated by the evaporation of liquid gasoline came in contact with the flames of such fire and exploded and prostrated portions of the building in which the insured commodities were stored, then the damage done to such commodities by reason of such prostration was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

2. In sustaining the trial court in such portions of the charge to the jury as instructed them that gasoline was not one of the articles covered by the insurance, but was inserted to "offset the forfeiture of the policy," the parts of the charge referred to being as follows (R., pp. 25, 26):

"You hardly need be told, I think, as ordinary business men, that a privilege to keep something does not bring the

privileged article within the articles insured by the policy. Suppose that clause read 'privilege to keep not more than fifty pounds of gunpowder' on the premises, and the party insured was keeping a dry-goods store or a drug store, would it be contended by any sensible man that the gunpowder was an article insured by the policy? Clearly this privilege to keep was inserted to offset the forfeiture of the policy if the provisions contained in this policy were violated without this privilege, and that provision is this:

"'If gunpowder, phosphorus, naphtha, benzine, or crude earth or coal oils are kept on the premises, or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises, in quantities exceeding one barrel at any one time, without written consent of the company,' the policy should be void.

"So that if these five barrels of gasoline were kept upon those premises without the written consent of the company, the policy would have been absolutely forfeited and the plaintiff would not have been entitled to recover damages for loss if the whole stock had been destroyed by fire."

3. In sustaining the trial court in its refusal to grant the third prayer asked by counsel for the plaintiff, which prayer is as follows (R., p. 23):

"If the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action, and if the jury further find from the evidence that the prostration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action."

4. In sustaining the trial court in granting the first, second, third, and fourth prayers asked by counsel for the defendant, which prayers are as follows (R., pp. 23, 24):

"1. If the jury find from the evidence that the plaintiff

had stored in the cellar of his premises gasoline or other oil or vapor, and that from a leaky condition of the receptacle in which such gasoline, oil, or vapor was kept or from any other reason the said cellar had become permeated to a great or small degree with escaped or escaping vapors, and that a burning match in the hands of an employé of the plaintiff or dropped by said employé of plaintiff, being brought into contact with such escaped or escaping vapors, caused an explosion, and that the damage, if any, to the chattels of the plaintiff resulted solely from such explosion, they should render a verdict for the defendant.

"2. The jury are instructed that a lighted match held in the hand of an employé of the plaintiff, from which an explosion is caused resulting from ignition of vapors from oil or gases, is not to be considered 'fire' in the meaning of the policy sued on.

"3. If the jury find from the evidence that an explosion or ignition of explosive matter not caused by a preceding fire took place on the plaintiff's premises, and that the loss or damage, if any, to his merchandise was caused solely by said explosion or ignition of explosive matter, then the plaintiff is not entitled to recover.

"4. If the jury find that there was in the cellar of the premises occupied by the plaintiff as a store gasoline or other vapor oil, and that an employé of the plaintiff going down in the said cellar ignited a match, and that in consequence of said ignition of said match, acting alone, an explosion occurred prostrating the building in which plaintiff kept his store, they cannot find for the plaintiff for such loss or damage as was occasioned to his goods by such explosion and falling of the building, and their verdict should be for the defendant."

5. In sustaining the trial court in such portions of the charge to the jury as instructed them that the word "explosion," where used in the policy of insurance, must be restricted to the meaning given it by "ordinary men," the parts of the charge referred to being as follows (R., p. 27):

"Now, gentlemen of the jury, when the word 'explosion' was used in this policy, the company, as ordinary men—at least its officers were ordinary men and not, I assume, scientific men—and the party insured, an ordinary man, are pre-

sumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word. And, after all, the question here being explosion or non-explosion, is, what do you, as ordinary men, understand occurred at that time in the light of all the testimony? Was it an explosion in the ordinary and popular sense of that word, or was it a fire with a subsequent explosion or a subsequent collapse of the building as a sequence to the fire?"

POINTS AND AUTHORITIES.

I.

Plaintiff's first prayer should have been granted, as there was some evidence tending to prove that there was fire in the back cellar at the time Oliver struck the second match.

It is a well-settled rule of law that whenever there is a question of fact before the court and there is any testimony, no matter how slight, tending to prove the existence of such fact, the question is one within the peculiar province of the jury, and it is reversible error in the court to withdraw it from them.

As was said by Mr. Justice Brewer, in delivering the opinion of the court in Richmond, &c., R. R. Co. *vs.* Powers (149 U. S., 43):

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

Here the undisputed fact is that there was fire in the back cellar after the building collapsed, and nowhere else. It

was in this part of the cellar that gasoline vapor was most likely to be. Here the gasoline tank had been sunk into the ground, with the supply pipes leading directly to the store floor just above; and it will be remembered that this tank was practically empty from Saturday till Monday, the day of the accident. During this period vapor was being thrown off, for gasoline generates vapor all the time and at all ordinary temperatures (R., p. 14). When the four barrels of gasoline were put into the tank at eleven o'clock on Monday morning, the vapor formed during the preceding thirty-six hours was forced upward, and necessarily escaped first into the back cellar. Before it could flow thence to the front cellar, its volume must have been sufficient to cover the back-cellar floor to a depth of four inches. Otherwise it could not get over the doorsill of the opening between back and front cellars, for between these cellars there was a solid brick wall, with an opening for a door, with a sill "four inches higher than the back-cellar floor" (R., p. 7).

"Gasoline vapor is about three times as heavy as air and falls through the air. It flows like a liquid over the surface on which it is until it has reached the lowest point, like all other liquids, tending to assume a position of equilibrium" (Prof. Munroe, R., pp. 13, 14). Mixed with air, in proportions from 5 to 25 per cent. of vapor to 95 or 75 per cent. of air, it is an explosive, the maximum violence being reached when the mixture is composed of 10 per cent. of vapor and 90 per cent. of air. When the proportion of vapor to air is under 5 and over 25 per cent. it is not explosive, but a vigorous puff results on the ignition of the mixture.

The volume of the front cellar was 4,653 cubic feet and of the back cellar 1,252 cubic feet. If the tank were empty of gasoline the volume of vapor it might contain, if forced out, would be 3.1 per cent. by volume of the cubic contents of the back cellar, not sufficient to make an explosive mixture

if equally distributed throughout the back cellar, and practically harmless if let loose in the front cellar.

The vapor in the cellar the day of the accident must have been such as was forced out of the tank when the four barrels of gasoline were put into it about eleven o'clock the same morning, for "gasoline vapor dissipates when it is exposed unconfined to another atmosphere. The rapidity with which it dissipates depends upon circumstances. If it is constantly stirred by persons walking through it or in any other way, it dissipates very rapidly" (Prof. Munroe, R., p. 14). All the evidence shows that at no other time, except upon the forenoon of the accident, when the tanks, which had been empty thirty-six hours, were filled with liquid gasoline, had vapor accumulated in either cellar in combustible quantities.

Matches were lighted many times a day in both cellars, and there were frequently half a dozen lighted candles sitting round the cellar floor during busy seasons (R., p. 7). The burst of flame that Oliver first saw all over the front cellar might well have come from the back cellar through the opening for a door between the two.

After the collapse Volkman saw a "little blaze oozing out quite near the back-cellar steps," and called a fireman to put it out (R., p. 10).

Andrew J. Sullivan, a witness for the insurance company, himself the foreman of a fire-engine company, saw "smoke coming out of the cellar at the end wall of the back building." He looked in and saw "a can on a barrel, a pint cup, and there was a little blaze coming out of it, with something in it burning" (R., p. 18). The jury may well have inferred that this "little blaze" coming from the "pint cup" had caused the explosion, if there was one.

Kurtz, another of the company's witnesses, also connected with the city fire department, saw "a fire in the cellar and called a fireman to bring his stream and put the fire out." "It was in the southwest corner of the main cellar, about ten

feet from the west wall" (R., p. 18), or just alongside of the opening into the back cellar.

Oliver thus describes the conditions as he observed them:

"The first thing I noticed on recovering consciousness was the fact that the back cellar was full of fire, and, knowing that the gasoline was in that part of the cellar, I used every effort to get as far away from it as possible. I crawled towards the front, where I was pulled through the front wall" (R., p. 8).

There was not the slightest trace of fire in the front cellar after the collapse and none when Oliver went down. And there could not have been any vapor in the front cellar, for even if Oliver had not detected the odor, its presence must have developed while the first match he lit was burning. It was while he was continuing his search along the shelving of the east wall of the front cellar by the aid of the second match, that he first noticed any signs of fire.

The conclusion is, therefore, almost inevitable that there was fire at the same time in some other part of the cellar, and it could only have been in the back cellar, otherwise Oliver must have seen it as he walked across the front cellar towards the east wall.

In the back cellar goods were unpacked and pieces of tarred string, bits of paper, excelsior, and other inflammable substances sometimes fell upon the floor and were scattered about. In this back cellar, too, workmen lit matches, and, when they had found what they wanted, frequently dropped them on the floor or put them on the stoves or castings, without thought of danger. In this way a piece of tarred string might have been ignited on that Monday morning, and, after burning for some minutes, dropped to the floor, where, as has been shown, gasoline vapor was most likely to be. And a little blaze might have been in the back cellar without attracting Oliver's attention when he went into the front cellar—he was moving in an opposite direction.

There was no odor of gasoline vapor in the front cellar when Oliver went down, for otherwise he must have detected it. He knew "the odor, which is pungent, unmistakable and easily detected" (R., p. 7). "A person could not go into a room charged with gasoline vapor without detecting the odor" (Howe, R., p. 13).

Oliver also knew of the explosive qualities of such vapor, and had there been the slightest trace of its presence in the front cellar he could not have lit a match except on the theory of suicidal intent, which was not brought out in the evidence.

The fire that Oliver saw in the front cellar while his second match was burning was a flame of a "bluish color" (R., p. 8), such as gasoline vapor makes, and he describes it as being all over the cellar at once. He was much confused by what happened and could not say where the fire started, but Professor Munroe says that "a person igniting gasoline vapor with a match could not fail to be aware of the fact" (R., p. 14).

The plaintiff's first prayer was properly framed to suit these facts, which were undisputed, and therefore fair-minded men might "draw different conclusions from them." To refuse the prayer was, therefore, reversible error.

Curiously enough, the learned justice who presided over the trial before the jury seems to have been of the opinion that this or some similar instruction should have been granted, for he says in his charge to the jury (R., p. 26):

"The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to the fire," &c. * * *

This is exactly what was aimed at in the plaintiff's first prayer, except that it limited the *locus* of the antecedent fire

to the back cellar, the only place it could possibly have been. The prayer was refused, and no other on the point was asked or given.

Plaintiff's second prayer dealt with an entirely different proposition—the vacuum theory. Its predicate was that if the "loss or damage was the result of fire not having its commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises," &c. As will be observed, it contains no reference to damage caused by an explosion, whether originating in fire or otherwise.

If the jury had found that there was fire, however slight, in the back cellar, just before the explosion and causing it, their verdict must have been for the plaintiff.

The leading case in support of this proposition is Transatlantic, etc., Ins. Co. *vs.* Dorsey, 56 Md., 70, wherein Mr. Chief Justice Alvey announced the opinion of the court as follows:

"Where a fire has occurred, and is in progress, the effects of which are covered by the policy, and an explosion takes place as an incident or result thereof, so as to increase the loss, whether the whole of the damage or loss thus produced can be regarded as within the protection of the insurance, in a case where the policy contains the exemption from liability for explosions, has been the subject of some diversity of judicial opinion. We think, however, both upon reason and the established rules of construction, that such loss should be regarded as within the risk assumed by the insurers. In such case, the fire is the direct and efficient cause of the loss, and the explosion but the incident, and if the insurers intend to exclude such liability, they must do so by plain and unambiguous terms. Indeed, the difficulty in such case as ascertaining and distinguishing the loss to be attributed to the fire from that caused by the explosion—separating the actual or probable effects of the explosion from those produced or that would have been produced, but for the explosion, by fire—at once furnished strong reasons for including the effect of the ex-

plosion in the loss occasioned by the precedent fire, producing the explosion. The contrary construction would do much to impair the security that should be offered, by policies containing the clause in question" (79).

See also Washburn *vs.* Farmers', &c., Ins. Co., 2 Fed. Rep., 304.

And Washburn *vs.* Miami, &c., Ins. Co., 2 Fed. Rep., 633.

In La Force *vs.* The Williams City Ins. Co., 43 Mo. App., 518, it appeared that a servant sprinkled gasoline on the kitchen floor to kill vermin. Some of it trickled through cracks and formed vapor under the floor. Later in the day the servant dropped a lighted match on the floor. There was no explosion, but the servant noticed that some of the liquid gasoline was burning. After a few minutes the wainscoting became ignited and an explosion followed. *Held*, insurer responsible for full amount of loss.

The court say:

"A contract drawn by the insurer, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the insured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the insured" (530).

II.

Gasoline was part and parcel of the goods kept for sale by the assured, and was, and was intended to be, protected by the insurance.

The property insured is thus described in the written part of the policy:

"On his stock of stoves and their findings, tins and tinware, tools of trade and such other goods kept for sale in a

first-class retail stove and tin store, situate 3108 M street, Georgetown, D. C. Privilege granted to keep not more than five barrels of gasoline or other oil or vapor" (R., p. 5).

The indemnity provided is "against all such immediate loss or damage as may occur by fire to the property specified."

Gasoline was one of the articles kept for sale by the assured. In fact, he dealt largely in that commodity, having elaborate machinery for supplying customers and guarding against accident. The quantity specified in the contract was sufficient notice to the insurer that it was kept for sale, for as much as five barrels of gasoline could not be needed in a stove store for any other purpose. So the concluding sentence of the description of the property insured should be read as follows: "Privilege granted to keep *for sale* not more than five barrels of gasoline or other oil or vapor."

The words "such other," as used in the description of property insured, in the sentence "tools of trade and such other goods kept for sale," would ordinarily restrict the liability of the underwriter to damage to goods of *kindred nature* with "tools of trade." But this could not have been the intention of the parties, for, if so, Mitchell might have carried in his stock for sale tools of any trade or business, however hazardous, thus greatly increasing the risk. Equally unreasonable would it be to construe this sentence as referring to the tools of his trade, for, naturally, they were not kept for sale. So, to arrive at a proper interpretation of the property description, the word "other" must be eliminated as misleading or superfluous, and the words "as are" interpolated after the word "trade," thus making the concluding sentence read as follows: "Tools of trade and such * * * goods (as are) kept for sale in a * * * stove and tin store, situate 3108 M street, Georgetown."

Such a reading embodies the contract of the parties in its entirety. The agent of the insurance company knew, or

must be presumed to have known, what kind of goods the assured intended to keep for sale, and it was the manifest intention of both parties that that stock—all of it, not one article more than another—should be insured against damage by fire. It could not be successfully contended that if an ordinary fire had occurred, unattended with explosive incidents, and injuring or destroying the gasoline on hand, its value would not have been an item in the computation of the loss or damage sustained by the assured. This is in perfect accord with the indemnity clause which insures against loss or damage to the property "specified," gasoline being one of these articles.

The learned justice who delivered the opinion of the Court of Appeals construes this clause as if it read "such goods as are usually kept for sale in a first-class retail stove and tin store" (R., pp. 41, 42); but it is submitted that the language used is not susceptible of such an interpretation. To sustain this argument the language of the policy is quoted as follows: "kept for sale in a first-class retail stove and tin store situate in Georgetown, D. C." If that were the language used, there might be some ground for the contention; but the very important words "3108 M street" are left out of the quotation. These words limit the inquiry to that particular store, and would have prevented the introduction of evidence touching the custom of other stove stores in Georgetown, if any there be.

All of the cases cited in the opinion of the Court of Appeals in support of this proposition, without exception, turned on general expressions used in the contracts of insurance, under which evidence of custom was admissible.

For purposes of illustration several of these will be noticed.

In Steinbach *vs.* Insurance Co., 13 Wall., 183, the policy covered "other articles in his line of business."

In Phœnix Insurance Co. *vs.* Taylor, 5 Minn., 393, the

words employed were, "and such other goods as are usually kept in a general retail store."

In Maril *vs.* Conn. Fire Insurance Co., 95 Ga., 605, the policy contained the words "and other material usual to a jewelry stock in and out of safes."

And so, substantially, of all the rest.

In the policy under discussion the property description relates, not to such goods as are usually found in retail stove and tin stores, but to the stock of goods kept for sale in a particular retail store, viz., 3108 M street. The words descriptive of this store—"first class"—can only be considered a bit of gratuitous advertising. Under this contract evidence tending to show the custom of other retail stove and tin stores, whether in Georgetown, Washington, or elsewhere, would be clearly inadmissible.

The learned justice who presided over the jury trial, in referring to the gasoline clause of the written description of the property kept for sale, says (R., p. 25): "Clearly this privilege to keep was inserted to offset the forfeiture of the policy;" and also (R., p. 26): "So if these five barrels of gasoline were kept upon the premises without the written consent of the company, the policy would have been absolutely forfeited." This is manifest error, for gasoline is not one of the inhibited articles specified as working a forfeiture of the policy if kept without the consent of the insuring company. "Naphtha" is mentioned, and "benzine," both distillates of crude petroleum, but gasoline is not mentioned and seems to have been purposely omitted. Whether this be so or not, it could not be added by the court below, when the effect of such an addition would be to vary the contract of the parties, if not work a forfeiture of it. The rule in such cases is that the court is bound to construe the contract as strongly against the insurer and as favorably for the insured as its terms will reasonably permit. Another rule, equally familiar and equally well established, is that provisions for for-

feitures, even where the intent is doubtful, are to receive a strict construction against those for whose benefit they are introduced.

From the record it is manifest that Mitchell's stock consisted principally of stoves and tinware—a fact which was known to the agent of the underwriters. To such a stock the direct danger from fire was very slight, so the rate of insurance was proportionately low. If, in addition to this stock, Mitchell had desired to carry a line of inflammable articles, such as wicker baskets, he would have made that fact known to the agents of the insurance company, paid an additional premium, and procured the "privilege," to be incorporated in the written part of his policy. Then, in the event of a fire and the destruction of the baskets, the insurance company would not have been heard to say that these baskets were not within the protection of the policy. So, also, of the gasoline.

III.

The liability to explode with destructive force being an incident of gasoline vapor when ignited, it is no defense to this action to allege that the damage was occasioned by an explosion, if the explosion originated in fire, and gasoline vapor was the explosive agent.

The plaintiff in error knew the danger of keeping gasoline—knew that the vapor from it burned very rapidly (R., p. 11)—and he was willing to pay the high premium charged for keeping as part of his stock in trade so hazardous an article of merchandise. The purpose of the written part of the contract is obvious—insurance against perils by fire, all of them, not one more than another, of keeping gasoline. To emphasize this intent, and to remove any possible suspicion that Mitchell might have had that he was not fully protected, the word "vapor" was included in the written part of the policy, prepared by the agent of the underwriter.

If any of the printed conditions are repugnant to this main purpose they must yield; otherwise the policy becomes a mere deception instead of the protection which the parties to it designed.

In a policy of insurance covering goods in a store there was a provision to the effect that the policy would be null and void "if said property is sold and conveyed." Commenting on this, the court say:

"Is this proviso applicable to the particular goods in the store at the date of the insurance? Clearly not, for the first sale at the counter would avoid the policy.

"Indeterminate forms of expression are to be understood in a sense subservient to the general purpose of the contract.

"Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.

"Nothing but the clearest expression of such a design would justify the assumption that an executed contract was intended by either party as a snare. If technical forfeitures could be sustained by such intendments, the effect would be to weaken private confidence in commercial faith, and occasion just solicitude as to the security of important rights.

"It ought not to be possible to charge that insurers aim at drawing customers into the payment of premiums by holding out illusory promises, couched in vague and deceptive terms, for the very purpose of enabling them to elude liability."

Hoffman *vs.* The Ætna, &c., Ins. Co., 32 N. Y., 405.

In Viele *vs.* German Ins. Co., 26 Iowa, 66, the policy covered a factory of encaustic window shades. It expressly prohibited the keeping of benzine on the premises. There was proof that benzine was used in the manufacture of paints and varnishes. The company was held liable on the ground that insurance on a factory covered incidents.

In Branard *vs.* Nat'l Fire Ins. Co., 27 Mo. App., 26, the defense was that gunpowder and petroleum were kept in the building, contrary to the inhibitions of the policy. The

reply to this defense was that it was written in the *written part of the policy* that the building was occupied as a general store, and that the keeping or use of gunpowder or petroleum was customary in country stores. *Held*, that the reply was good, and the plaintiff recovered.

See, also, Fraim *vs.* Ins. Co., 170 Pa. St., 151.

Faust *vs.* Ins. Co., 91 Wisc., 158.

The books abound in such decisions as these.

"A policy of insurance is to be interpreted like any other contract, so as to give effect to the mutual intention of the parties, and when it is partly written and partly printed, the written parts control the printed parts, and in case of repugnancy between the two the printed parts must be disregarded; and the contract is to be explained by reference to the circumstances under which it was made, and in case of uncertainty is to be interpreted most strongly against the party who caused the uncertainty to exist."

Yoch *vs.* Home Mutual Ins. Co., 111 Cal., 503.

(In this case the policy of insurance against loss by fire covered, in writing, a "stock of merchandise" such as is usually kept in a country store, and a printed condition in the policy rendered it void, "any custom of trade or manufacture to the contrary notwithstanding," if gasoline should be kept, used, or allowed upon the premises, "unless otherwise provided by agreement endorsed herein or added hereto." Evidence is admissible to show that gasoline is one of the articles of merchandise usually kept in a country store, and that the insured was in the habit of selling it at retail as part of his stock of merchandise, and it properly follows from such proof that gasoline was part of the subject of insurance, and that the assured did not violate the policy by keeping it in stock.)

As has been shown, gasoline was as much covered by the insurance as any other article of merchandise in Mitchell's store. In its liquid state gasoline will not burn. A lighted

match put into a barrel of gasoline will be extinguished. "It is no more explosive than wood or any other substance." As kept by the plaintiff in error—in an iron tank eighteen inches under ground—there was absolutely no danger of fire from the gasoline itself; but the vapor of gasoline, in certain proportions of vapor to air, is an explosive of high power, and when ignited is as certain to explode as gunpowder or any other explosive agent. When undisturbed, it assumes a position of equilibrium, and if, in that condition, it comes in contact with fire, a vigorous puff results, so vigorous as to leave the impression on the mind of an "ordinary" man that an explosion has occurred. Even Professor Munroe, a scientist of large experience, when asked to draw a distinction between "quick combustion" and "slow explosion," answered, "It is exceedingly difficult to draw a sharp line between any systems of classification."

Wherefore the insurance company ought not to be heard to say that it insured an explosive only in the event it did not explode—practically the only thing gasoline or its vapor can do when brought into contact with fire.

"Where camphene, or any hazardous fluid, is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken that effect should be given to the policy accordingly, unless a different intention is very plainly declared. And such an intention, instead of being hidden away in printed forms, remote from the principal contract, ought to be found in deliberate expressions, which are made use of at the time when the contract is entered into. Without doubt all the printed conditions and specifications annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practised by the underwriters, and upon, or within, those forms the parties to each policy actually issued write their own particular intentions. The plain meaning of the written part should, therefore, prevail, and other clauses must yield, if repugnant, or they must be construed so as to avoid a conflict of intention. In this case, I think, the perils of keeping and using camphene were insured

against, so far as the keeping and use of it were permitted at all, and that the clause which exempts the issuer from liability should be understood as applying to the presence of the articles under other conditions."

Harper *vs.* N. Y. City Ins. Co., 22 N. Y., 441–'4.

The point is exhaustively discussed and decided in favor of the contention of plaintiff in error in

Lynn Gas Co. *vs.* Meridian Ins. Co., 158 Mass., 570 (also reported in 20 L. R. A., 297).

"The subject-matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies, used in furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity."

In the present case the defendant in error, the insurance company, knew that Mitchell intended to deal in gasoline and charged him a high-rate premium for including it in the property specified as the stock in trade, and the company "must be presumed to have contemplated such effects as fire might naturally produce" when brought into contact with gasoline vapor.

Plaintiff's third prayer, which embodied the principle now contended for, was correctly addressed to the facts as developed by the evidence, being as follows (R., p. 23):

"if the jury find from the evidence that the liability to explode with destructive force is one of the incidents of gasoline vapor under certain conditions, then the defendant company will be presumed to have contemplated such effects as fire might or would naturally produce on such vapor when it issued the policy of insurance sued on in this action; and if the jury further find from the evidence that the pros-

tration of a portion of the building in which the insured articles were stored and the resulting damage to such articles were occasioned by an explosion of gasoline vapor having its origin in fire, the plaintiff is entitled to recover in this action."

This prayer should have been granted. To refuse it was manifest error.

The vice in all of the four prayers granted at the request of defendant's counsel consists in the illogical proposition that a burning match is not fire. True it may be that the theory that a lighted match, a candle, or a gas jet, if it causes an explosion, though clearly fire, is yet not fire within the meaning of a policy of insurance finds support in several cases of undoubted authority. It seems to have started with

Briggs *vs.* N. A., &c., Ins. Co., 53 N. Y., 446;

and was followed in—

United Life, &c., Ins. Co. *vs.* Foote, 22 Ohio St., 340;
Transatlantic, &c., Co. *vs.* Dorsey, 56 Md., 70.

But the logic of these cases may well be questioned. In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote, for the agent is one and the same throughout, namely, fire. The *causa* was burning gasoline vapor; the *causa causans* was a burning match; at each stage of the causation it was the action of *fire*. Suppose that when the witness Oliver went into that cellar he had quickly found the piece of casting called for by the customer, and had dropped the lighted match on the cellar floor, and then returned to the store; that this lighted match had set fire to pieces of tarred string or bits of excelsior which were left on the floor when stoves and lamp chimneys were unpacked, and that these articles, after burning for some min-

utes, had ignited the gasoline vapor and produced the explosion. On the authorities there can be no doubt that any loss occasioned by such an explosion would have been within the insurance, and it seems to be a frittering away of substantial rights to require any such flimsy intermediaries between the burning match and the burning vapor. Mitchell's indemnity was "against *all* such immediate loss as may occur by *fire*," and, as was shown in the evidence, the action of fire on gasoline vapor is either explosion, as scientists understand that word, or such rapid combustion as will cause "ordinary men" to believe an explosion has actually happened, and no other agent than fire will cause an explosion of gasoline vapor.

The word "explosion," as used in the printed clauses of the policy, must be restricted to such explosions as do not originate in fire. The "fire" referred to in the indemnity clause is not limited to the burning of some one or the other of the articles insured, but, in the broadest terms, includes *fire* in any and every manifestation of it.

The learned justice in the trial court was so enamored of this fallacy as to tell the jury that the plaintiff could not recover for any damage resulting from "rapid combustion" if started by the "lighted match held in Mr. Oliver's hand" (R., p. 27). He had previously granted the second prayer asked by counsel for the plaintiff (R., p. 23) as follows:

"If the jury believe from the evidence that on the 28th day of September, 1896, the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss or damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured

was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action."

The "lighted-match" restriction in the charge, and the prayers granted on the request of defendant's counsel practically withdrew the case from the consideration of the jury, for the plaintiff could not thereafter contend that he was entitled to recover if the building collapsed by reason of a vacuum created by the sudden "combustion of any non-explosive substance in the cellar."

After having heard the testimony of the witness Oliver, Professor Munroe expresses the following opinion (R., p. 15):

"From the testimony, as I heard it, I am of the opinion that the building was prostrated through the combustion of some body there or some substance there that burned rapidly, and that as a result of this rapid combustion, there being, according to Mr. Oliver's testimony, but a psh-ing sound in the burning by the increased pressure, the floor was raised to a slight extent, and then, by the condensation, there was a pressure brought to bear upon the upper surface of the floor, and then it gave way. That, from my observation and hearing his testimony, is the impression I have got and the opinion I hold."

But the learned justice in the trial court told the jury, substantially, that if the prostration of the plaintiff's building was the result of a partial vacuum in the cellar, caused by the rapid combustion of gasoline vapor, even though unaccompanied with an explosion of any sort, the damage thereby occasioned was not a loss within the protection of the policy, if the combustion started with a match held in Oliver's hand.

He had previously ruled that there was no evidence of fire in the back cellar, and there was no fire in the front cellar except the lighted match, otherwise Oliver must have

seen it. So the effect of this last instruction was to tell the jury that there was no fire anywhere in the plaintiff's premises on the day of the accident within the meaning of the policy of insurance, and was, of course, tantamount to directing a verdict for the defendant, which was ultimately rendered.

The court below was clearly wrong in that portion of the charge to the jury which restricted the meaning of the word "explosion" to what the "ordinary man would understand to be meant by that word." This is utterly at variance with the requirements of the well-settled rule of interpretation as applied to insurance contracts, which is—

"That where a contract of insurance is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that *reasonably, intelligent men* on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the assured."

Imperial Ins. Co. *vs.* Coos Co., 151 U. S., 462.

It is also at variance with that other well-established rule which holds that—

"Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a *strict* construction against those for whose benefit they are introduced."

Hoffman *vs.* Ætna. &c., Ins. Co., 32 N. Y., 405.

In the present case we have a rational definition of the word explosion from Prof. Munroe, presumably a "reasonably intelligent man." According to this an explosion "is accompanied with a loud report." But the witnesses who were near the building at the time of the accident heard no such report; only a noise such as is made by a bad firecracker or the "vigorous puff" of burning gasoline vapor. While no "reasonably intelligent man" would characterize such an occurrence as an "explosion," an ordinary man

might do so, especially in a community where, as in Georgetown, even the policemen are startled by the sound of "the sun-down gun, * * * at Ft. Myer," more than a mile away.

For these reasons it is respectfully submitted that the judgment of the court below should be reversed.

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